

EXHIBIT 36

From: "Marks, Jonathan" <jmarks@pa.gov>
Sent: 6/2/2020 10:21:58 AM +0000
To: Jeff Greenburg <jgreenburg@mcc.co.mercer.pa.us>; "Mathis, Jessica" <jesmathis@pa.gov>
Subject: Re: PA DOS Email: Pre-Canvass and Canvass Reminders
Good morning Jeff.

I hope you have a good Election Day as well. Good luck today!

Below is a summary of the research our counsel did for me regarding the question of whether such ballots should be rejected.

The canvass section at 25 P.S. § 3146.8 could be interpreted as requiring that all absentee and mail-in ballots must be returned within both envelopes. However, caselaw reviewing absentee ballots found that disenfranchising voters over minor errors is a serious matter. In *In re Recanvassing of the First Election Dist. Of Jefferson Tp.*, 12 Pa. D. & C.4th 536, 1991 WL 439229 (Fayette C.C.P. 1991), the court determined that two incorrectly canvassed write-in ballots should not be rejected as "[t]he election laws are to be construed liberally so as not to deprive a voter of the right to elect the candidate of his choice." *In re Recanvassing of the First Election Dist. Of Jefferson Tp.*, 12 Pa. D. & C. 4th 536, 538 (1991), citing *In re nomination Petition of Justin Johnson*, 509 Pa. 347, 502 A.2d 142 (1985). The counting of absentee ballots at the wrong time of the day in contravention of statute did not lead to rejection of absentee ballots in a 1975 Cumberland County case, the court stating "[t]he disenfranchising of even one person validly exercising his right to vote is an extremely serious matter." *In re Silver Spring Tp. Supervisor Election*, 72 Pa. D. & C.2d 396, 399, 26 Cumb. L.J. 16 (1975), citing *Absentee Ballot Case (No. 1)*, 431 Pa. 165, 173, 245 A.2d 258 (1968). And the canvassing of absentee ballots by the county board of elections, arguably in contradiction of the then-existing constitutional provisions, was appropriate, the court determining "[i]t ... would be a stultification of reason and justice, as well as a jettisoning of common sense, ... because, in effect, the counters of the votes sat in a brick and stone courthouse instead of a garage, schoolhouse, or empty building as they counted ballots. Certainly this is not sound reason for invalidating votes, free from any semblance of taint." *In re Canvass of Absentee Ballots of 1967 General Election*, 245 A.2d 258, 262 (Pa. 1968).

As noted in my email, please consult with your solicitor about your plans regarding these ballots. If the board decides to reject ballots solely on this basis, the board should be prepared to defend its decision in court.

Jonathan Marks
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From: Jeff Greenburg <jgreenburg@mcc.co.mercer.pa.us>

EXHIBIT

Marks 08/19/20 EX36

Sent: Tuesday, June 2, 2020 6:12:06 AM

To: Mathis, Jessica <jesmathis@pa.gov>; Marks, Jonathan <jmarks@pa.gov>

Subject: RE: PA DOS Email: Pre-Canvass and Canvass Reminders

Jonathan and Jessica,

First of all, I hope all of you have a good day and as few calls as possible.

We have a Board of Elections meeting this morning and our solicitor has asked that DOS provide statutory authority for this guidance. We would appreciate any information you believe is appropriate. We still fall back on 3146.6 (a) as the prevailing statute, but would be more than happy to look at any other sections that you believe apply. If this is a case where the state is recommending each county take action based on the guidance of its own solicitor we will do so as well.

- **In the event that a voter inadvertently fails to insert her ballot in the secrecy envelope, the board may develop a process whereby the ballot can be inserted into an envelope or privacy sleeve to preserve the secrecy of the ballot.**

Kindest regards,

Jeff Greenburg

Director of Elections

Mercer County Bureau of Elections

5 Courthouse

Mercer, Pa., 16137

724-662-7542

From: Mathis, Jessica <jesmathis@pa.gov>

Sent: Monday, June 1, 2020 3:39 PM

To: Mathis, Jessica <jesmathis@pa.gov>

Subject: PA DOS Email: Pre-Canvass and Canvass Reminders

Importance: High

Dear County Election Official,

As you finalize preparations for tomorrow's primary, please find some helpful reminders regarding the pre-canvass and canvass.

Pre-Canvass Reminders:

Notwithstanding that a county board of elections may adopt their own pre-canvassing procedures that follow the statutory principles of transparency and accuracy in all processes, pre-canvass procedures should adhere to the following:

- The Board staff must take measures to ensure that ballots will ultimately be tabulated by precinct, although it is preferable to also have election results by ballot type.
- Issue verbal guidelines to participants explaining that **no person in attendance may disclose**

any results prior to the close of polls on election day.

- For each unchallenged ballot whose declaration was deemed sufficient by staff, the Board may further examine the declarations on the envelopes to ensure that declarations have been signed.
- Ensure that no envelope contain any text, mark or symbol which reveals the identity of the elector, the elector's political affiliation or the elector's candidate preference, and if so, the envelopes must be set aside unopened and declared void.
- If no deficiency is identified, the envelopes may then be opened in a manner that preserves the integrity of the declaration and the inner ballot secrecy envelope may be removed and separated from the outer declaration envelope.
- In the event that a voter inadvertently fails to insert her ballot in the secrecy envelope, the board may develop a process whereby the ballot can be inserted into an envelope or privacy sleeve to preserve the secrecy of the ballot.
- For each ballot whose application is challenged, the Board shall ensure the envelope is marked as "Challenged" and the reasons for the challenge are noted on the envelope. The Board shall have the envelopes set aside intact. The secrecy ballot envelope may not be removed from the outer envelope.
- **If the pre-canvassing process is completed before the time the polls close, be sure not to take any steps to record and publish the votes reflected on the ballots until the time the polls are closed.**
- If the pre-canvass process is not complete prior to the time the polls close, the scanning process may continue until complete and at that time, the ballots may be tabulated, a results tape may be generated, and the results can be made public.
- **Only following the close of the polls** may the county board record and publish the votes reflected on the ballots for all approved absentee and mail-in ballots.

Canvass of Supplemental Absentee Ballots and Mail-in Ballots:

County boards must meet no earlier than the close of polls and no later than the third day following the election to canvass all returned absentee and mail-in ballots that were not included in the election day pre-canvass meeting. The only distinction between a pre-canvass and a canvass meeting is that election results generated during a canvass meeting may be made public.

- This meeting shall continue until all civilian absentee and mail-in ballots received prior to 8:00 p.m. on election day and all military and overseas citizens absentee ballots have been canvassed.
- A county board of elections shall provide at least forty-eight hours' notice of a canvass meeting by publicly posting a notice on its publicly accessible Internet website.
- An authorized representative of each candidate in an election and one representative from each political party shall be permitted to remain in the room in which the absentee ballots and mail-in ballots are canvassed.
- When entering the results into the vote tabulation software, be sure that you are either updating the election day results or replacing the election day results, as appropriate, to ensure that the final results of all absentee and mail-in ballots are accurately reflected in the data.

Stay safe everyone! Thank you for everything you are doing during this unprecedented election cycle.

Jessica Mathis, Director
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